88-1047

No.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

BECHTEL CONSTRUCTION, INC.,

Petitioner,

v.

LABORERS DISTRICT COUNCIL

and

LABORERS INTERNATIONAL UNION
OF NORTH AMERICA, LOCAL 135,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

A. Does the Nuclear Regulatory Commission's policy that off-site drug users be denied work access to the construction site of a nuclear power facility pending mandatory rehabilitation invalidate an arbitrator's award directing an employer to grant back pay and unlimited reemployment rights to employees who the arbitrator found had traces of marijuana in their systems at the construction site of a nuclear power plant?

B. Where a nuclear power plant owner, in accordance with Nuclear Regulatory Commission policy and its contractual rights, directs a contractor to deny certain of its employees work access to a nuclear power plant construction site because of possession and/or use of drugs, does an arbitrator exceed his authority by requiring the contractor to provide the excluded employees with back pay and unlimited reemployment rights at the construction site?

LIST OF PARTIES

The caption of the case in this Court contains the names of all the parties.

RULE 28.1 LIST

The listing of all parent companies, subsidiaries and affiliates of Bechtel Construction, Inc. required by Rule 28.1 is too lengthy for inclusion here. Accordingly, the Rule 28.1 listing is contained in the Appendix to this Petition beginning at E-1.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Bechtel Construction, Inc., respectfully prays that a writ of certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit entered in the above-titled proceeding on November 2, 1988.

OPINIONS BELOW

The Judgment Order of the United States Court of Appeals for the Third Circuit issued without opinion on November 2, 1988, is unreported and is reprinted in the Appendix hereto beginning at A-1.

The Memorandum and Order of the United States District Court for the Eastern District of Pennsylvania (Gawthrop, D.J.) is unreported and is reprinted in the Appendix hereto beginning at B-1.

The Opinion and Award of Arbitrator Charles L. Mullin, Jr., is unreported and is reprinted in the Appendix hereto beginning at C-1.

JURISDICTION

Petitioner invoked the jurisdiction of the district court pursuant to Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185. On April 25, 1988, the district court entered judgment in favor of Respondents. The court of appeals had jurisdiction over Petitioner's appeal of the district court judgment pursuant to 28 U.S.C. §1291. On November 2, 1988, the Third Circuit entered an order affirming without opinion the judgment of the district court. No petition for rehearing was filed. This Court's jurisdiction to review the decision of the Third Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

Involved in this Petition are the Labor-Management Relations Act, 29 U.S.C. §185 and the Nuclear Regulatory Commission's regulations governing the construction and operation of nuclear power facilities, 42 U.S.C. § 2131-2141, 10 C.F.R. Part 50, including its Policy Statement on Fitness for Duty of Nuclear Power Plant Personnel, 51 Fed. Reg. 27,921 (August 4, 1986). Relevant portions of the statutes, regulations, and policy statement are reproduced in the Appendix hereto beginning at D-1.

STATEMENT OF THE CASE

This case involves a direct and fundamental conflict between the finality of arbitration awards and the primacy of federal policies governing the safe construction and ultimate operation of nuclear power plants. A Nuclear Regulatory Commission policy requires a nuclear power plant owner to exclude from the site, pending mandatory rehabilitation, individuals who use drugs off-site. Here, the arbitrator found that three of Petitioner's employees had traces of marijuana in their systems, but held that Petitioner did not have cause to restrict their access to the site pending mandatory rehabilitation. The arbitrator so held even though he found that Petitioner's exclusion of the employees from the site was mandated by the owner of the site.

The facts of this case are not in dispute. A full discussion of the facts is set forth in the arbitrator's opinion which is included in the Appendix to this Petition beginning at C-1.

Petitioner, Bechtel Construction, Inc. ("Bechtel" or "the Company" or "the Petitioner"), has served, pursuant to a contract with Philadelphia Electric Company ("PECO"), as the general contractor for construction of the Limerick Unit II Generating Station owned by PECO and located in Limerick Township, Pennsylvania. The grievants, members of Union Local 135 of the Laborers International Union of North America ("the Union" or "the Respondents"), were employed by the Petitioner as laborers at the Limerick II site.

Bechtel and the Union were parties to a Collective Bargaining Agreement ("The Project Agreement") which governed labor matters in connection with the construction of the Limerick Unit II facility. The Project Agreement provides for the resolution of disputes arising under the Project Agreement through grievance and "final and binding" arbitration. Article IV of the Project Agreement reserves to the Company the right to discipline or discharge employees for just cause.

The nuclear power industry is subject to an extensive and comprehensive regulatory scheme promulgated by the Nuclear Regulatory Commission ("NRC") designed to promote the safe and efficient construction and ultimate operation of nuclear powered production and utilization facilities. *See* 42 U.S.C. §§2131-2141, 10 C.F.R. Part 50. Under this regulatory scheme, a potential operator that has undertaken to construct a nuclear power production and utilization facility must obtain a construction permit and comply with detailed regulations in order to qualify for an operating license. *See* 10 C.F.R. §50.10. As part of its compliance, a potential operator is obligated to formulate and adopt a "Quality Assurance Program" which meets the criteria set forth by the NRC to ensure the ultimate safe operation of the facility. *See* 10 C.F.R. §50.34 & App. B. Failure to comply with the strictures of the Quality Assurance Program may be grounds for revocation of the potential operator's construction permit or, upon completion of the facility, denial of an operator's license. 10 C.F.R. §50.55-57.

The NRC, recognizing the potential impact of illicit drug use on the safe construction and operation of nuclear power stations, has issued a formal Policy Statement on "Fitness for Duty of Nuclear Power Plant Personnel." 51 Fed. Reg. 27,921 (Aug. 4, 1986) ("NRC Policy Statement"). This Policy Statement, which is not a formal regulation, recognizes the nuclear industry's own initiatives to combat drug use in nuclear power facilities, and sets forth what is expected from a potential operator's fitness for duty program. In this connection, the NRC has determined that an effective fitness for duty policy is an integral part of a potential operators Quality Assurance Program during the construction phase of the facility. *See Carolina Power & Light Co. (Shearon Harris Nuclear Plant)*, 23 N.R.C. 299, 304, *aff'd*, 24 N.R.C. 532 (1986).

The NRC Policy Statement provides that fitness for duty programs covering the restriction of work access to those involved with illicit drugs, either on- or off-site, are a minimum

requirement. Subparagraph (1) requires that use or possession of drugs "within the protected area" requires discharge of an employee. Subparagraph (2) requires that "any other" use or possession of drugs, necessarily including off-site use or possession, requires revocation of access to the site and mandatory rehabilitation.

> • It is Commission policy that the sale, use, or possession of alcoholic beverages or illegal drugs within protected areas at nuclear plant sites is unacceptable.
>
> • It is Commission policy that persons within protected areas at nuclear power plant sites shall not be under the influence of any substance, legal or illegal, which adversely affects their ability to perform their duties in any way related to safety.
>
> • An acceptable fitness for duty program should *at a minimum* include the following essential elements:
>
> (1) A provision that the sale, use or possession of illegal drugs within the protected area will result in immediate revocation of access to vital areas and discharge from nuclear power plant activities. The use of alcohol or abuse of legal drugs within the protected area will result in immediate revocation of access to vital areas and possible discharge from nuclear power plant activities.
>
> (2) A provision that *any other sale, possession, or use of illegal drugs will result in immediate revocation of access to vital areas, mandatory rehabilitation prior to reinstatement of access, and possible discharge from nuclear power plant activities.*
>
> (3) *Effective monitoring and testing procedures to provide reasonable assurance that nuclear power plant personnel with access to vital areas are fit for duty.*

51 Fed. Reg. at 27,921 (emphasis added).[1]

[1] "Protected areas" refers to any area encompassed by physical barriers and to which access is controlled. *See* 10 C.F.R. § 73.2(g).

At the time of the incident giving rise to the underlying arbitration, pursuant to its Quality Assurance Program and in accord with NRC policy, PECO had in place a policy regarding on- or off-site drug use by PECO or Bechtel employees who had access to the Limerick I and II sites. The policy recognized that PECO, rather than Bechtel, retained control over access decisions, and that such decisions could be based on off-duty conduct where that conduct posed a risk of adversely affecting on-site performance.

The dispute began when Bechtel, at PECO's direction, denied work access to the nuclear power plant construction site, pending mandatory rehabilitation, to three of its employees who had tested positive for marijuana use in connection with a drug incident at the site. The Union challenged Bechtel's action by submitting the dispute to an arbitrator. After a hearing, the arbitrator found as a fact that the three employees involved had tested positive for marijuana, and that the Company had denied these employees access to the site at PECO's direction. In addition, he found that marijuana users pose a threat to their own safety, other site employees, and the general public through the hazard of work not properly performed. Nevertheless, the arbitrator concluded that under the parties' Project Agreement the urinalysis test results that were positive for marijuana did not provide just cause to exclude the employees from the site pending mandatory rehabilitation.

Following issuance of the arbitrator's opinion, the Petitioner filed an action in the United States District Court for the Eastern District of Pennsylvania under Section 301 of the Labor-Management Relations Act of 1947 ("Section 301"), 29 U.S.C. §185 to vacate the award on the grounds that it was contrary to public policy and failed to draw its essence from the Agreement. Respondents filed an answer and counterclaim under Section 301 seeking enforcement of the award. Following the submission of cross-motions for summary judgment by the parties, the district court issued a memorandum and order

granting the Union's motion for summary judgment and entering judgment in favor of the Union.

Petitioner filed a timely notice of appeal from the district court's order. On November 2, 1988, after full briefing by both sides and oral argument, the United States Court of Appeals for the Third Circuit affirmed the district court's order without opinion. Petitioner did not seek rehearing.

REASONS FOR GRANTING THE WRIT

I. The Enforcement Of The Arbitrator's Award, Which Undermines The NRC's Efforts To Ensure The Safe Construction And Operation Of Nuclear Power Plants, Raises Important Questions Of Federal Labor Law Which Should Be Settled By This Court.

This case raises substantial and important questions under federal labor law concerning whether a federal court may enforce an arbitrator's award which directly conflicts with the expressed policy of the NRC governing the safe construction and operation of nuclear power facilities in this country. Resolution of these questions is of importance to all parties involved in the nuclear power industry as well as to the general public. As of January 1988 there were 109 nuclear power generating units in operation throughout the country and 14 under construction.[2] Thirteen of these units are located within the jurisdiction of the Third Circuit.[3] Petitioner itself is presently involved in the construction or maintenance of many of these units in several states. The questions raised by the Petition have not yet been, but should be, resolved by this Court.

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[2]U.S. Council for Energy Awareness, *Electricity from Nuclear Energy* 21 (1988).

[3] *Id.* at 8.

The first question involves the public policy implications of the award. The nuclear power industry is subject to pervasive safety regulations designed to ensure the safe and efficient construction and ultimate operation of nuclear power generating facilities. *See Iowa Elec. Light & Power Co. v. Local Union 204, IBEW,* 834 F.2d 1424 (8th Cir. 1987); *Rushton v. Nebraska Public Power Dist.,* 653 F. Supp. 1510 (D. Neb. 1987), *aff'd,* 844 F.2d 562 (8th Cir. 1988); *Alverado v. Washington Public Power Supply System,* 111 Wash. 2d 424, 759 P.2d 427 (1987). Indeed, NRC regulations and policies, and judicial decisions, evidence a well-defined and dominant public policy in favor of strict adherence to all NRC safety regulations designed to protect the health and safety of the general public. *See Iowa Elec. Light & Power Co.,* 834 F.2d at 1427.

In the case at bar, the arbitrator found as a fact that three of the grievants had tested positive for marijuana, and that traces of marijuana in an employee's urine would suggest generally that that employee was a marijuana user. Nevertheless, the arbitrator found that Bechtel, which acted at PECO's direction, did not have just cause to exclude the grievants from the site pending mandatory rehabilitation. The arbitrator found that Bechtel lacked just cause because the Project Agreement did not specifically address the issue of employees having drug traces in their urine. Accordingly, the arbitrator ordered the Company to grant the grievants back pay and unlimited reemployment rights at the site.

The NRC's regulations, its 1986 Policy Statement, and PECO's substance abuse policy, which was part of PECO's NRC-mandated Quality Assurance Program and to which Bechtel and its employees were subject, together evince a well-defined and dominant public policy that construction site employees engaged in off-site drug use be denied work access to the site pending mandatory rehabilitation. That is precisely the course of action which Bechtel took, at PECO's direction, with respect to the grievants who had tested positive for marijuana

use in this case. Under these circumstances, enforcement of the award invalidating Bechtel's and PECO's actions, and granting the employees back pay and unlimited reemployment rights, violates the well-defined and dominant public policy of the NRC regarding denial of work access to employees engaged in on- or off-site drug use.

The Third Circuit's decision enforcing the award under these circumstances has the effect of elevating an arbitration award to a position of superiority over the expressed public policy of the NRC and this nation concerning the safe construction and ultimate operation of nuclear power facilities. It jeopardizes the integrity of NRC policies and the public safety which those policies are designed to protect. The impact of the Third Circuit's decision has ramifications throughout the nuclear power industry.

Where an award clearly conflicts with a well-defined and dominant public policy, a federal court is obliged to refrain from enforcing it. *United Paperworkers Int'l. Union v. Misco, Inc.*, 56 U.S.L.W. 4011 (U.S. Dec. 1, 1987); *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers,* 461 U.S. 757 (1983); *Delta Air Lines, Inc. v. Air Line Pilots Ass'n,* No. 87-8839 (11th Cir. Dec. 8, 1988); *Iowa Elec. Light & Power Co., supra; Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173, Int'l Ass'n of Machinists and Aerospace Workers,* 857 F.2d 682 (9th Cir. 1988). While there is no question that federal labor policy favors the finality of arbitration awards, they should not be permitted to override the expressed public policy of the NRC. There is nothing in this Court's decision in *Misco, Inc.* that would warrant a contrary conclusion. *Cf. Misco, Inc., supra* (arbitration awards that clearly conflict with well-defined and dominant public policy should not be enforced).

Closely related to this issue is the question of the primacy of a nuclear power plant owner's control over site access. The regulations governing the construction and operation of nuclear power facilities, and administrative interpretations of those

regulations, require a potential licensee to adopt a Quality Assurance Program which must include a fitness for duty program governing access to the facility. *See Carolina Power & Light Co. (Shearon Harris Nuclear Plant)*, 23 N.R.C. 299, 304, *aff'd*, 24 N.R.C. 532 (1986). Under the NRC regulations, the site owner retains ultimate responsibility for ensuring adherence to the Quality Assurance Program. *See* 10 C.F.R. Part 50, App. B, ¶I. PECO's retention of exclusive authority over site-access decisions, pursuant to NRC regulations, and Bechtel's duty to defer to PECO's decisions concerning access, are confirmed in the parties' contract and reiterated in PECO's substance abuse policy.

The effect of the Third Circuit's decision is to wrest from a nuclear power plant owner and prospective licensee the authority to deny site access to contractor-employees who, an arbitrator confirmed, tested positive for marijuana use, thereby posing a significant safety threat to site employees and the general public. This result fundamentally conflicts with the expressed public policy of the NRC governing the safety of nuclear power facilities, and owner control over access to such facilities. *See, e.g., Bechtel Constructors Corp. v. Detroit Carpenters Dist. Council*, 610 F. Supp. 1550 (E.D. Mich. 1985) (nuclear power site owner has right to exclude contractor's employees that is superior to rights contained in collective bargaining agreement between contractor and its employees); *Florida Power & Light Co. v. Fleitas*, 488 So. 2d 148 (Fla. App. Dist. 1986) (nuclear power site owner must be given widest possible authority to bar anyone from premises). The Third Circuit's decision in this case has grave implications for the NRC-owner-contractor[4] relationship at all nuclear power facilities throughout the nation. Resolution of this important issue is essential not only to an accommodation of federal labor law and NRC policy, but also to the safe construction and operation

[4] Contractors include not only construction contractors, but also maintenance contractors on nuclear power plants which now are in operation.

of nuclear power plants. Because the issues involved in this case are so important, this Court should grant certiorari and resolve them.

II. This Court Should Resolve The Conflict In Principle Among The Circuits Concerning Whether An Arbitration Award Fails To Draw Its Essence From The Agreement When The Absence Of A Causal Connection Between The Employer's Actions And The Grievants' Injuries Renders The Award Punitive.

In this case the arbitrator found that PECO had directed Bechtel to exclude the three grievants from the site pending rehabilitation. Under the terms of PECO's contract with Bechtel, PECO retained exclusive authority over access to the Limerick II site. Because PECO, not Bechtel, caused the grievants to be excluded from the site and because Bechtel was and remains powerless to return the grievants to the site over PECO's objection, there is no causal link between Bechtel's alleged breach of the Project Agreement and the grievants' injuries. Where there is no causal link between the breach of a collective bargaining agreement and the grievants' losses, the award is punitive and not compensatory. *See Baltimore Regional Joint Bd. v. Webster Clothes, Inc.*, 596 F.2d 95, 98 (4th Cir. 1979). In this case, the Project Agreement contains no provision for the award of punitive damages for violations of the Project Agreement, and it prohibits the arbitrator from changing, amending, adding to or subtracting from the terms of the Project Agreement. Nevertheless, the Third Circuit enforced the arbitrator's award.

The circuits are in conflict over the question of whether a punitive award fails to draw its essence from the collective bargaining agreement where the agreement does not provide for punitive awards. The First, Fourth and Eighth Circuits have held that punitive awards do not draw their essence from

the agreement, where the agreement does not otherwise authorize such awards, and are therefore unenforceable. *See Bacardi Corp. v. Congresso de Uniones Industriales de Puerto Rico,* 692 F.2d 210, 214 (1st Cir. 1982); *Baltimore Regional Joint Bd. v. Webster Clothes, Inc., supra* at 98; *International Ass'n of Heat & Frost Insulators, Local Union 34 v. General Pipe Covering, Inc.*, 792 F.2d 96 (8th Cir. 1986).

The Ninth Circuit and, by implication, the Third reject that view and enforce such arbitration awards. *See Pullman Power Products Corp. v. Local 403, United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitting Industry,* No. 86-6572 (9th Cir. September 16, 1988) (overruling *Howard P. Foley Co. v. International Bhd of Elec. Workers,* 789 F.2d 1421 (9th Cir. 1986))[5]. According to the Ninth Circuit, its earlier decision in *Howard P. Foley Co,* was inconsistent with this Court's recent decision in *United Paperworkers Int'l Union v. Misco, Inc., supra.*

These cases point up the conflict among the circuits on an issue which is of utmost importance to all contractors and site owners involved in the construction of nuclear power facilities. Resolution of this conflict is essential to the proper administration of federal labor law.

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[5] A petition for rehearing en banc has been filed in the *Pullman* case. As of the date of this Petition, the Ninth Circuit has not acted on that petition.

III. CONCLUSION

For the foregoing reasons, Bechtel Construction, Inc. respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-1433

BECHTEL CONSTRUCTION, INC.

Appellant

VS.

LABORERS DISTRICT COUNCIL AND
LABORERS INTERNATIONAL UNION
OF NORTH AMERICA, LOCAL 135

On Appeal from the United States District Court
For the Eastern District of Pennsylvania
(Civil Action No. 87-6536)
District Judge: Honorable Robert S. Gawthrop, III

Argued October 17, 1988

BEFORE: STAPLETON, SCIRICA, AND COWEN
Circuit Judges

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ORDERED AND ADJUDGED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court

_____

Circuit Judge

ATTEST:

_____

Sally Mrvos, *Clerk*

Dated: November 2, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BECHTEL CONSTRUCTION, INC.

v.

LABORERS DISTRICT COUNCIL
and
LABORERS INTERNATIONAL UNION
OF NORTH AMERICA, LOCAL 135

CIVIL ACTION

No. 87-6536

MEMORANDUM

Pending before this court are two motions, the first being a motion for summary judgment, filed on behalf of the defendants, Laborers District Council and Laborers International Union of North America, Local 135 (union), and the second being a cross motion for summary judgment, filed on behalf of Bechtel Construction, Inc. (company). The case revolves around the discharge of four employees by the company on charges of possession of illegal drugs on the company premises. Pursuant to a collective bargaining agreement, the case was heard before an arbitrator, who concluded that the company had failed to establish that they were guilty of the charges. The arbitrator accordingly ordered the company to compensate the grievants for the time they lost from work. The company filed suit in this court, seeking to vacate the arbitrator's award on the basis that it violated the public policy against permitting drug users work access to the construction site of a nuclear power plant.

FACTS

On January 10, 1985, the company entered into a bargaining agreement with its union, which was to apply to all construction work performed on the construction site of Limerick Unit II Generating Station, a nuclear power plant located in Limerick Township, Pennsylvania. Pursuant to the agreement, all disputes arising under the contract would be referred to an impartial arbitrator for final and binding arbitration. Article XI. The agreement also provided, in pertinent part, that:

> [i]n order to provide for the safety of employees and to provide a safe working environment, the following Drug and Alcohol Abuse Policy shall be adhered to by all Employers, employees, visitors and suppliers on the construction site.
>
> Any person covered by this policy shall be denied access to or removed from the project and subject to termination if he/she is:
>
> 1. Under the influence of; using; possessing, buying, selling . . . controlled substances or drug paraphernalia.

Article IV.

In February 16, 1986, the company barred Legrand Crawford from the construction site for violation of the rule against the possession of drugs at the site. On February 17, 1986, the company provisionally barred Donald Flippen, Glenn Bullock, and Darryl Carrol from the site because they had tested positive for marijuana, subject to their rehire upon successful completion of a drug rehabilitation program.

The facts giving rise to the above discharges are not in dispute. On February 12, 1986, a security guard, making his rounds at the construction site, came across a small pouch in the employee parking area. The pouch contained a white powdery substance, some money, and a small metal tube. Near the spot

where the pouch was found was a parked car with a suspicious looking cigarette protruding from the rear door armrest ashtray on the passenger side of a parked vehicle. The company called the township police who arrived shortly afterwards. The officer surmised that the cigarette contained marijuana and requested that the owner of the vehicle be summoned for questioning. The owner granted the officer access to the vehicle, and a search was conducted.

Following the search, the owner of the automobile was interviewed by the officer. The owner told the officer that he had carried passengers that morning, and that one of them, Mr. Crawford, had been seated next to the rear door ashtray.

Shortly afterwards, a test was conducted which confirmed the officer's suspicion that the cigarette in question was indeed a marijuana cigarette. Mr. Crawford was summoned for an interview with the officer. After talking with him, the officer agreed to drop any drug charges, if one of the passengers would plead guilty to a lesser offense of Disorderly Conduct. Mr. Crawford later appeared at the police station and pled guilty to the Disorderly Conduct charge in connection with the incident.[1]

On February 14, 1986, the company denied Crawford access to the site and informed him that his employment at the

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[1] The Pennsylvania Crimes Code defines Disorderly Conduct as follows:

A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:

(1) engages in fighting or threatening, or in violent or tumultuous behavior;

(2) makes unreasonable noise;

(3) uses obsene language, or makes an obscene gesture; or

(4) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.

18 Pa. Cons. Stat. 5505. I am aware that creative prosecutors, in their quest for an amicable resolution, have been known to offer bargained-down pleas to disorderly conduct upon scenarios which have to be factually gerrymandered in order to squeeze or stretch within that definition. Be that as it may, for purposes of this analysis, the discussion must be confined to the four corners of the statutory definition.

Limerick Unit II site was terminated. The Company informed the other occupants of the vehicle that they were to submit to a drug screen or be barred from the site. The employees all agreed to submit to such tests.

Messrs. Flippen, Bullock, and Carrol tested positive for marijuana, and were summarily dismissed from employment, subject to successful completion of an approved rehabilitation program, if work was available.

On September 15, 1987, the arbitrator, having considered the evidence presented to him in the hearings on this matter, concluded that the company had failed to establish just cause for the discharge of the employees. In particular, he found that the evidence relied upon the company to discharge Mr. Crawford was wholly circumstantial, and that Crawford's entry of a guilty plea to a charge of disorderly conduct "did not encompass and in no way related to possession of a [marijuana] cigarette." Nor did the arbitrator find that traces of marijuana in the urine samples of the other employees resulted in "possession" as the term was used in the bargaining agreement, because the term required that drugs be "on one's person" and not "in" or "within" one's person. (Arb. Op. at 11). Likewise, the arbitrator rejected the company's contention that the employees had been under the influence of drugs, stating:

> [T]here is no evidence of possession or aberrant behavior of any one of these Grievants. It is critical that by the admission of the Company's own expert witness, . . . there is no scientific method of proving impairment based on even a high positive reading of the test results. The expert witness stated that the marijuana metabolites may have been present in the urine for a period of one to two weeks with no measure of how much was ingested or under what circumstances. Moreover, the possibility that marijuana can enter the human system through passive smoking cannot be overlooked.

Id.

The arbitrator further noted that the pouch and cigarette had not been presented at the hearings, having been lost by the police, and therefore the evidence was subject to "an aura of some question," particularly since the test kit used to determine the contents of the cigarette was not properly used. He also noted that the testimony of the company witnesses regarding the pouch was "somewhat in conflict." *Id.*

The arbitrator ordered the company to pay each of the employees the difference between potential earnings from the date of discharge until the date of the award, and earnings otherwise realized during this period.

DISCUSSION

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed. 2d 265, 273 (1986).

The scope of judicial review of an arbitrator's decision is narrow. Where the parties' bargaining agreement provides for dispute resolution by an arbitrator, courts may not overrule the arbitrator's interpretation of the bargaining agreement merely because the courts would have reached a different interpretation of the agreement, or because they would have evaluated the evidence differently. *Equitable Gas Co. v. United Steelworkers of America,* 676 F. Supp. 648 (W.D. Pa. 1987). "[O]nly where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the [arbitrator's] award." *Koshatka v. Philadelphia Newspapers, Inc.,* 762 F.2d 329, 333 (3d. Cir. 1985), *quoting Ludwig Honold Manufacturing Co. v. Fletcher,* 405 F.2d 1123, 1128 (3d. Cir. 1969).

Plaintiff asserts that the arbitrator's award should be vacated because it violates "the well defined and dominant public policy against permitting drug users work access to the construction site of a nuclear plant." *See: W.R. Grace & Co. v. Rubber Workers,* 461 U.S. 757, 103 S.Ct. 2177, 76 L.Ed 2d 298 (1983) (arbitrator's award may be vacated where enforcement would violate explicit public policy). *See also: Iowa Electric Light & Power v. Local Union 204,* 834 F.2d 1424 (8th Cir. 1987) (court refused to enforce award permitting reinstatement of nuclear power machinist where machinist deliberately violated safety regulations).

I have no quarrel whatsoever with the general proposition. Drugs are, of course, properly prohibited from the workplace, and the propriety of that prohibition is enhanced geometrically when that workplace happens to be nuclear. The question, however, is not the propriety of the prohibition of the workrule, but whether the arbitrator's finding that the company failed to prove a violation of its work rules concerning use or possession of a controlled substance is within the scope of this court's review.

In *United Paperworkers International Union, AFL-CIO v. Misco, Inc., U.S.* , 108 S.Ct. 364, 98 L.Ed. 2d 286 (1987), an employee was apprehended by the police in the back seat of a car with a lighted marijuana cigarette in the front-seat ash tray. The arbitrator held that, based on this evidence, the company had failed to prove that the employee had violated its policy against possession or use of drugs on the premises. The Fifth Circuit of the Court of Appeals refused to enforce the arbitrator's decision on the basis that it was contrary to the well-defined public policy against the introduction of drugs into the work place. In reaching its conclusion, the Court noted that "we had thought it common knowledge that the narcotic effect of marijuana can be obtained by simply sitting in a small enclosure where smoke from it is present." *See: Misco, Inc. v. United Paperworkers International Union, AFL-CIO,* 768 F.2d 739, 741 n.2 (5th Cir. 1985). On appeal, the Supreme

Court held that the Fifth Circuit had exceeded its scope of review, *inter alia,* by second guessing the arbitrator's evaluation of the evidence. The Court, speaking through Justice White, observed: "No dishonesty is alleged: only improvident, even silly factfinding is claimed. This is hardly sufficient basis for disregarding what the agent appointed by the parties determined to be the historical facts." 108 S. Ct. at 371.

Here, the company asserts, in essence, that arbitrator erred in failing to find that the evidence before him was sufficient to sustain the company's charges that the employees had violated company work rules pertaining to controlled substances, and that, by so doing, the arbitrator, in effect, condoned illegal acts of the employees. I cannot, however, alter the result without illicitly placing myself in the role of a factfinder. *United Postal Service v. National Association of Letter Carriers, AFL-CIO,* No. 87-3501, slip. op. at 9, (3d Cir. February 5, 1988).

Accordingly, I will deny the plaintiff's and grant the defendant's motion for summary judgment.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BECHTEL CONSTRUCTION, INC. v. LABORERS DISTRICT COUNCIL and LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 135	CIVIL ACTION No. 87-6536

ORDER

AND NOW, this 22nd day of April 1988, Defendant's Motion for Summary Judgment is GRANTED, and Plaintiff's Motion for Summary Judgment is DENIED. Judgment is entered in favor of Defendants, enforcing the Opinion and Award of Arbitrator Charles Mullen. Plaintiff is ORDERED to comply with the Award by making payments to each of the Grievants in accordance with the arbitrator's award. Such payment shall be made within the next pay period after this Order is entered, and shall include interest at the legal rate from September 15, 1987, the date of Arbitrator Mullen's Award, to the date of payment pursuant to this ORDER.

BY THE COURT:

Robert S. Gawthrop, III, J.

IN THE
MATTER OF ARBITRATION

Between

BECHTEL CONSTRUCTION, INC.

And

LABORERS DISTRICT COUNCIL
LOCAL 135

BOTH OF
LIMERICK, PENNSYLVANIA

DECISION IN GRIEVANCE INVOLVING DISCHARGE OF FOUR EMPLOYES FOR ALLEGED VIOLATION OF DRUG POLICY

AAA CASE NO: 14 300 0595 86 A

GRIEVANCE: Each of four Grievants protests discharge for the alleged violation of the Company's Drug Policy.

AWARD:

1. The grievance is granted in part in the case of each of the four Grievants.
2. The Company is directed to make payment to each of the Grievants for the difference between potential earnings from the date of discharge until the date of this Award, and earnings otherwise realized during this period, and it is directed that such payment be made within the pay period following that in which this Award is rendered.
3. The Union and the Grievants are directed to cooperate with the Company in establishing interim earnings.
4. The Grievants' right to return to employment as new employes is not limited by this Award.

Administration

By letter of July 1, 1986 from the Philadelphia Regional Office of the American Arbitration Association the undersigned was notified of his selection to hear and decide a matter then in dispute between these Parties. The case was bifurcated by the Parties and hearings went forward on the matter of arbitrability on September 29 and 30, 1986 where the Parties presented testimony and evidence in support of positions advanced, and on the evenings of September 30, 1986 and October 3, 1986 the undersigned met with the representatives of the Parties. That record was closed and the matter resolved by an Award of December 6, 1986.

The Parties reconvened to present testimony and evidence on the merits of the issue on March 24, 25, 27 and 31; April 9 and 30; and May 1, 1987, where the Grievants appeared and testified in their own behalf. The undersigned met with representatives of the Parties on June 11 and July 20, 1987. Post-Hearing Briefs were duly filed and exchanged, whereupon the record was closed. The matter is now ready for final disposition.

Grievances and Questions To Be Resolved

The following Demand For Arbitration was filed on March 25, 1986 (Union Exhibit-1):

NATURE OF DISPUTE:

The Union grieves the termination from employment of Glenn Bullock, Donald Flippen, Darryl Carroll and L. Crawford.

REMEDY SOUGHT:

The Union requests that the above four employees be reinstated to employment and paid full back pay for all time lost.

The questions to be resolved are:

(1) Did the Company have just cause to summarily discharge Grievant LeGrand Crawford;

(2) Did the Company have just cause to provisionally discharge Grievants Glenn Bullock, Donald Flippen and Darryl Carrol; and

(3) If not, what shall the remedy or remedies be?

Cited Portions Of The Agreement

The following portions of the Agreement (Joint Exhibit-1) were cited:

ARTICLE IV — MANAGEMENT RIGHTS

The Employer retains full and exclusive authority for the management of its operations. The Employer shall direct its work force, including, but not limited to hiring, promotion, transfer, lay-off or discharge for just cause. . . .

* * * * *

(f) In order to provide for the safety of employees and to provide a safe working environment, the following Drug and Alcohol Abuse Policy shall be adhered to by all Employers, employees, visitors and suppliers on the construction site.

Any person covered by this policy shall be denied access to or removed from the project and subject to termination if he/she is:

1. Under the influence of; using; possessing, buying, selling or otherwise exchanging; whether or not for profit, controlled substances or drug paraphernalia.

2. Under the influence of; consuming; possessing, buying, selling or otherwise exchanging; whether or not for profit, alcoholic beverages.

Factual Background

The Company is the general construction contractor at the Philadelphia Electric Company ("PECO") Limerick Unit II Generating Station, a nuclear-fueled electric power generating plant. As may be gathered, Limerick II is the second installation to be erected and is adjacent to Limerick I, both of which are located in Limerick Township in the general vicinity of Pottstown, Pennsylvania.

The incidents giving rise to this issue occurred in February, 1986. More precisely, the triggering event occurred at approximately 8:45 A.M. on February 12, 1986 when a Security Guard on his appointed rounds came upon a small pouch in the employe parking area. The pouch contained a small amount of money as well as two small plastic bags of a white powdery substance and a small metal tube. The pouch with its contents was turned over to a Security Supervisor a short time later.

The Guard and the Security Supervisor then carried the pouch with its contents to the Project Security Supervisor for his scrutiny and direction. The Project Security Supervisor, after observing the pouch contents, directed the Guard to lead the two Supervisors to the location where he found the pouch. After pointing out the approximate location of the spot where the pouch was found, the Guard returned to his regular duties. The two Supervisors proceeded to survey the surrounding area and the parked vehicles to ascertain the possible presence of additional material of a suspicious nature.

In the course of their search they did observe a suspicious looking cigarette protruding from a rear door armrest ash receiver on the passenger side of an employe's parked automobile. The two then returned to their office to apprise the Project

Superintendent of their findings. The Superintendent instructed the Supervisors to notify the local police department of their discovery. Shortly after receiving their call the Limerick Township Chief of Police arrived at the Plant Security Office. Having examined the pouch and its contents the Chief requested to be taken to the place where the pouch had been found. The Security Guard once more was asked to point out the spot where he had come across the pouch. Once again he was dismissed from the investigation to resume his regular duties.

The Project Security Officer then directed the Chief to the vehicle with the suspicious cigarette. The Chief opined that the subject cigarette was a hand-rolled marijuana cigarette. Predicated on probable cause, the Chief requested that the employe-owner of the vehicle be summoned for questioning and permission to search the vehicle. The owner was identified through police channels and subsequently appeared at the parking area escorted by his Union Steward. Observing accepted police procedure, access to the vehicle in question was granted by the owner and a search was conducted by the Chief.

The suspicious cigarette and residue from two ash receivers were gathered as evidence in the investigation and were wrapped for further examination. The employe-owner of the vehicle was then interrogated regarding the presence of the "cigarette" and the identity of recent passengers in his vehicle. He freely disclosed not only the names of his passengers but also their respective seating positions during the morning drive to work that day. The Grievant seated adjacent to the ash receiver that contained the "cigarette" was LeGrand "Billy" Crawford. There were five passengers in all, four of whom became Grievants herein. In addition to identifying his passengers, the driver commented that he had smelled what he thought was marijuana smoke in the car on the way to work. The driver's cooperation was motivated by his eagerness to be disassociated from what obviously would develop into a police investigation.

The Chief took the "cigarette" to the construction site Security Office where he conducted a reagent kit field test of a portion of the filler from the suspicious cigarette. The Chief determined that the test results, color, confirmed his original deduction that the cigarette contained marijuana rather than tobacco. Because of his alleged seating position in the vehicle that morning, employe Crawford was summoned to the Plant Security Office for questioning. The content of the conversation between the Chief, Crawford and the vehicle's owner is the subject of some controversy between the Parties. It is agreed, however, that an offer was made to the two that if one passenger would report to Police Headquarters after 4:00 P.M. of that day and would plead guilty to a disorderly conduct charge, and would pay a fifty dollar fine, no marijuana charges would be lodged by the police. Disorderly conduct is, of course, a summary offense and therefore of considerably less consequence than a violation of the Drug Device and Cosmetic Act, a misdemeanor.

Understanding that the plea bargain would absolve all of the passengers of drug charges by the police and additionally would bar discipline by the Company, employe Crawford availed himself of the less egregious charge of disorderly conduct at the appointed place and time.

All of the foregoing incidents took place on Wednesday, February 12, 1986. No disciplinary action was taken by the Company on Thursday, the Grievants working their normal shift. Meanwhile the Company deliberated on the appropriate response to the circumstances. The information that the Company had available was: (1) Crawford had confessed to the Limerick Township Chief of Police that he had placed the "cigarette" in the ash receiver; (2) the Chief determined the "cigarette" to be marijuana; and, (3) the Company had cause to require the driver, Granby, and his five passengers Crawford, Daily, Flippen, Bullock and Carrol to submit to urine tests.

Bechtel's management had conferred with their customer, PECO, regarding what action would be appropriate. PECO initially suggested that all who had been in the vehicle be removed from the job site. Bechtel countered with the recommendation that the six be given drug screens before deciding which employes would be denied access to the job site. PECO agreed to that approach for everyone except Crawford, taking the position that he must be denied access to the site without the benefit of a drug screen.

The Company concurred with PECO's directive and accordingly barred Crawford from the site on Friday morning, February 14, 1986. Additionally, the other four occupants of the involved vehicle were intercepted at the clock-in gate and were told that they would either submit to a drug screen or be barred from the job site. They elected to submit to the test and were escorted to the plant dispensary. Employe Flippen was not intercepted and had proceeded to his work station.

The four employes furnished the Plant Nurse with urine specimens which were duly marked with each employe's name. Certain precautions were taken to ensure that the specimens were properly submitted and identified. The four specimens were then delivered to the Pottstown Memorial Medical Center (PMMC) for forwarding to the American Medical Laboratory (AML) in Fairfax, Virginia for analysis. Later that shift, Mr. Flippen went through the same routine and his specimen was delivered to PMMC.

AML conducted drug and marijuana tests on the specimens and reported back that the results of four tests had come out positive for marijuana. Of those four, one also showed traces of cocaine although that fact is not relevant to the action taken by the Company. The four employes whose urine contained marijuana were Daily, Flippen, Bullock and Carrol. The driver, Granby, was exonerated by virtue of his negative results.

Learning of the test results, the Company provisionally discharged the four whose test results were positive for marijuana. That meant that they would be denied access to the job site at Limerick II until each of them underwent drug rehabilitation in a recognized program and provided the Company with written confirmation that they had successfully completed the program. Crawford's discharge was final, to the extent that under no circumstances would he be employed by the Company at Limerick II.

The four employees who were offered the rehabilitation option elected not to comply and consequently have never returned to work at PECO's job site in Limerick Township. Instead they have joined with Crawford to challenge the Company's action in the instant discharges.

Preliminarily, the Company challenged the Union's right to move this issue to arbitration as they alleged that no grievance was filed in Step One of the grievance procedure, *inter alia.* A separate hearing went forward on September 30, 1986 regarding the threshold question of arbitrability. The undersigned found the issue to be arbitrable, and this Award addresses the merits of the grievance.

Contentions Of The Parties

Contentions of the Company

The Company contends that possessing drugs at the job site, including traces of drugs in an employe's system, is a serious breach of acceptable conduct. In support of its position it emphasizes that the nature of the work being performed at a nuclear power plant is particularly sensitive, requiring special attention to matters of personal safety. Failure to exercise such safety, it urges, poses serious risks to the employes and, indeed, residents of the community. Because of the possible consequences the Company asserts an inherent right to take reasonable steps to ensure a drug-free workforce.

The Company argues that the Grievants here were well aware of the prevailing rules regarding the Company's prohibition against drugs. The Company cites the specific language of the Agreement, Article IV, Paragraph (f) to bolster its argument. That language, the Company urges, is reinforced by work rules restating the same drug prohibition, which rules have been presented to each employe.

The Company contends that it had just cause to discharge employe Crawford because he did admit to the Chief of Police that the marijuana cigarette was his. That fact, the Company maintains, constitutes introduction of marijuana onto PECO's property, an offense punishable by discharge. In turn, the Company rejects the Grievant's contention that the Chief promised employe Crawford that if he pleaded guilty to the summary offense of disorderly conduct, none of the passengers of the suspected vehicle would be discharged by the Company. The Company points out that the plea was related to a police investigation which had no bearing on the continuing employment of the suspects and that the Chief had no authority to make any representation regarding job status.

The Company contends further that it acted reasonably in denying job site access to Carrol, Bullock and Flippen until each could demonstrate that he was rehabilitated. It submits that a finding of evidence of marijuana in the vehicle gave it probable cause to require urine tests and the results of those tests in turn established the right to bar the Grievants' return to work.

Contrary to the urging of the Union, the Company contends that the urine specimens were prepared and transported with due care. From the time the specimens were collected in the presence of the Union Steward until they were placed in the custody of AML, the Company maintains that there was no opportunity for a misidentification of the samples.

Further, the Company maintains that the drug and marijuana screens performed by AML were extraordinarily accurate. In support of that contention the Company cites AML's quality control statistics which indicate accuracy levels of 99.50 to 99.75 percent.

Finally, the Company contends that actual impairment need not be shown to justify the imposition of discipline. It argues that the mere presence of controlled substances in the employe's systems presents a risk of impairment which could result in injury to the employe or his fellow workers.

Accordingly, the Company maintains that it took reasonable action in all four cases and seeks to have those actions upheld in a denial of the grievance.

Union Contentions

At the outset the Union contends that serious doubt is raised regarding the existence of the mysterious pouch, the suspicious looking "cigarette" and alleged residue from the ash trays of the automobile central to this issue. This doubt, it submits, arises out of the disappearance of the material evidence that was subpoenaed but allegedly is no longer in police custody.

Additionally, the Union contends that no consensus could be reached by the Company's Witnesses as to where the pouch was found and its general description.

Even if the "cigarette" did exist, the Union contends, the field testing of its contents as performed by the Chief of Police was seriously flawed because, according to the Chief's testimony, he failed to follow the explicit test instructions of the manufacturer of the kit. Specifically, he ruptured all three ampules simultaneously rather than in the described sequence at timed intervals.

The Union argues further that the Company's tactics of forcing the employes to be drug tested or be discharged was improper. Had the employes refused, as the Union claims they should have done, the Company would have been forced to try this issue without the so-called negative test results. The fact that they did cooperate, the Union maintains, is indicative of the fact that the Grievants felt that they had nothing to conceal.

Another contention advanced by the Union is that Grievant Crawford never admitted to the police that the "cigarette" was his. He maintains that he merely did what he was requested to do, namely plead guilty to the summary offense of disorderly conduct to ensure that he and the other employes under suspicion would neither be prosecuted by the police nor discharged by the Company. This, the Union would have it, is the understanding that he reached after meeting with Company representatives and the police.

The Union points to considerable testimony on the record as characterizing the urine specimen chain of custody relative to the identity and transportation of the samples as fraught with gaps and potential opportunities for mishandling. The Union urges that the chain of custody did not meet acceptable standards, especially where its compromise might seriously affect the long-term well being of the Grievants.

It is also important to consider, the Union contends, that the marijuana screen results were not confirmed under the most stringent technology available to the testing laboratory. Again, the Union maintains, when a testing procedure involves the discharge of several employes, every scientific means of confirmation ought to have been employed. In the absence of such care, the Union argues, the possibility does exist that one or more of the test results were false.

Finally, the Union maintains that even if the test results were accurate, they do not support the Company's position of just cause for discharge. This is true, the Union argues, because

there is no evidence of impairment, when, how or how much of the marijuana was ingested by any Grievant.

For all of these reasons, the Union contends that the Company has failed to prove guilt beyond any reasonable doubt, the standard for discharging the Grievants involved in this issue.

Discussion And Findings

While on its face, the fact is accepted that safety goals are critical and must be sought, it must also be accepted that safety goals cannot be attained absent some focus on the fundamental concepts of industrial discipline. In the enforcement of drug rules there does exist the possibility of obscuring the rights of an employe in the face of strict enforcement of these rules. Here the issue turns essentially on the balance between rules enforcement rights as argued for by the Company, and employe rights as argued for by the Union.

Certainly, in the instant set of circumstances there exists grave cause for concern for the matter of safety since the workplace is the construction site of a nuclear-fueled power plant. Indeed, the Company here is under contract with the Philadelphia Electric Company, who at the time of concern had experienced drug-related safety problems similar to the one at hand, and it is a fact that PECO had established strict guidelines for employes of contractors working on the site, as well as its own employes.

The Agreement between the Parties does address the matter of concern here in Article IV, Management Rights, Paragraph (f), Drug and Alcohol Abuse Policy, and the Preamble of Article IV addresses the matter of just cause for discharge actions.

Management relies on this language to support its discharge action of employe Crawford, essentially sub-paragraph

1, which in part proscribes being, "under the influence of; using, possessing . . . . " Crucial here is the fact that the evidence on record regarding the use or possession is wholly circumstantial. No Witness testified to having observed Crawford either smoking or placing a suspicious cigarette in the ash receptacle. It was established that he had ridden that morning and that he had been seated just next to the receptacle in which the cigarette was found in the Granby vehicle.

The Grievant strenuously denies that he admitted to the Chief of Police that the "cigarette" belonged to him. He maintains rather that he merely entered a guilty plea to the summary charge of disorderly conduct. He maintains that while he entered a guilty plea to the summary charge of disorderly conduct, this action did not encompass and in no way was related to possession of a majijuana cigarette. The Company position relative to this critical matter is ambivalent. On one hand the Company would have it that since the discussion between the Chief of Police and the Grievant occurred outside and away from the plant that it has no standing whatsoever. On the other hand it attaches significance to this conversation insofar as it constitutes an admission by the Grievant, according to the Company, that he "possessed" the "cigarette" found in the Granby vehicle.

In considering the possession question further, it was never established that Crawford had traces of marijuana in his urine. He was summarily discharged on the strength of the Chief's allegation of an admission of possession and Grievant Crawford was not subjected to a marijuana test as were the other Grievants. Even if the Grievant had been subjected to a marijuana screen and had tested positively it strains the definition of "possession" to maintain that that word would encompass the contents of one's bladder. Based on the foregoing then there is no just cause here for this Grievant's separation.

Turning then to the other three Grievants, the Company relies, *inter alia,* on the technical results of the marijuana screen

which in each case revealed traces of marijuana in the urine sample and this is the essence of the Company's case involving these three Grievants.

The finding of a trace of marijuana in a urine sample of an employe would suggest generally that that employe was a marijuana user. A marijuana user is one who does pose a threat to his own safety and the safety of other employes, not to mention the hazard of work not properly performed at a nuclear power site. These straightforward facts notwithstanding, it would be an oversimplification, indeed it would be totally improper, for the undersigned to make findings on this basis. This is so simply because he is bound otherwise by the Agreement, under the standards for interpretation of Article IV, Paragraph (f), for disposition of drug matters.

Here the Company attempts to establish some nexus between the test results and "possession," as this term is used in the Agreement. Literally, possession means "the detention and control, or the manual . . . custody" (*Black's Law Dictionary,* Revised Fourth Edition). The Company's interpretation of the word "possess" does not comport with that definition, since the Grievants neither held nor had control of the marijuana that had been metabolized within their respective bodily systems. In common usage then "possession" must mean "on" one's person and not "in" or "within" one's person.

The language of Paragraph (f) would serve the Parties determinatively in an instance where an employe was found to be in possession of drugs on Company property, but, as indicated, this is not the case here.

Turning to the "under the influence" aspect of Paragraph (g), as it is involved here, there is no evidence of possession or aberrant behavior of any one of these Grievants. It is critical that by the admission of the Company's own expert witness, Dr. Bogema, there is no scientific method of proving impairment based on even a high positive reading of the test results. The

expert witness stated that the marijuana metabolites may have been present in the urine for a period of one to two weeks with no measure of how much was ingested or under what circumstances. Moreover, the possibility that marijuana can enter the human system through passive smoking cannot be overlooked.

On all of the foregoing it must be found that the Company has not established just cause for the summary discharge of Grievant Crawford or the provisional discharges of Grievants Flippen, Carrol or Bullock, in the absence of a showing of the controlling language of the Agreement, Article IV, Paragraph (f) having been violated.

With respect to the triggering incident, finding of the purple pouch or purse, the alleged marijuana cigarette, and the alleged residue in the ash trays, the fact that these were not presented as evidence, having been lost or destroyed by the Limerick Township Police, would at best place them in an aura of some question. Moreover, the testimony with respect to the pouch or purse adduced from the Company Witnesses was somewhat in conflict.

At the same time, the Chief's field test performed on the suspicious cigarette, based on his recitation of how he used the test kit, is not persuasive. The test kit obviously was not properly used. Therefore, the results of that test are less than convincing.

With respect to the Union's numerous challenges of the manner in which the urine samples of the Grievants were collected, transported and processed, it is true that the Company has developed certain refinements in the chain of custody since these Grievants were involved. In the main, however, there is no evidence whatsoever that would establish that the Grievants' respective cases were adversely affected by the manner in which the samples were collected by the Company and transported and processed by AML. The Company in fact appears to have dealt evenhandedly with the Grievants in this respect, as did AML in its processing of the tests.

In summary, the Company has not established the fact of contract violations which were the basis of its separation actions. Accordingly, there exists no cause for the Company's action and the grievance must be granted.

AWARD

1. The grievance is granted in part in the case of each of the four Grievants.

2. The Company is directed to make payment to each of the Grievants for the difference between potential earnings from the date of discharge until the date of this Award, and earnings otherwise realized during this period, and it is directed that such payment be made within the pay period following that in which this Award is rendered.

3. The Union and the Grievants are directed to cooperate with the Company in establishing interim earnings.

4. The Grievants' right to return to employment as new employes is not limited by this Award.

September 15, 1987
Pittsburgh, Pennsylvania

Labor-Management Relations Act, 29 U.S.C. § 141 et seq.

§ 185. Suits by and against labor organizations

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

Nuclear Regulatory Commission

§ 50.1 Basis, purpose, and procedures applicable.

The regulations in this part are promulgated by the Nuclear Regulatory Commission pursuant to the Atomic Energy Act of 1954, as amended, (68 Stat. 919) and Title II of the Energy Reorganization Act of 1974 (88 Stat. 1242) to provide for the licensing of production and utilization facilities.

* * *

§ 50.10 License required.

(a) Except as provided in § 50.11, no person within the United States shall transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, or use any production or utilization facility except as authorized by a license issued by the Commission.

(b) No person shall begin the construction of a production or utilization facility on a site on which the facility is to be operated until a construction permit has been issued.

* * *

§ 50.34 Contents of applications; technical information.

(a) *Preliminary safety analysis report.* Each application for a construction permit shall include a preliminary safety

analysis report. The minimum information[5] to be included shall consist of the following:

(1) A description and safety assessment of the site on which the facility is to be located, with appropriate attention to features affecting facility design. Special attention should be directed to the site evaluation factors identified in Part 100 of this chapter. Such assessment shall contain an analysis and evaluation of the major structures, systems and components of the facility which bear significantly on the acceptability of the site under the site evaluation factors identified in Part 100 of this chapter, assuming that the facility will be operated at the ultimate power level which is contemplated by the applicant. With respect to operation at the projected initial power level, the applicant is required to submit information prescribed in paragraphs (a)(2) through (8) of this section, as well as the information required by this paragraph, in support of the application for a construction permit.

(2) A summary description and discussion of the facility, with special attention to design and operating characteristics, unusual or novel design features, and principal safety considerations.

* * *

(6) A preliminary plan for the applicant's organization, training of personnel, and conduct of operations.

(7) A description of the quality assurance program to be applied to the design, fabrication, construction, and testing of the structures, systems, and components of the facility. Appendix B, "Quality Assurance Criteria for Nuclear Power Plants and Fuel Reprocessing Plants," sets forth the requirements for quality assurance programs for nuclear power plants and fuel reprocessing plants. The

[5] The applicant may provide information required by this paragraph in the form of a discussion, with specific references, of similarities to and differences from, facilities of similar design for which applications have previously been filed with the Commission.

description of the quality assurance program for a nuclear power plant or a fuel reprocessing plant shall include a discussion of how the applicable requirements of Appendix B will be satisfied.

* * *

(b) *Final safety analysis report.* Each application for a license to operate a facility shall include a final safety analysis report. The final safety analysis report shall include information that describes the facility, presents the design bases and the limits on its operation, and presents a safety analysis of the structures, systems, and components and of the facility as a whole, and shall include the following:

* * *

(6) The following information concerning facility operation:

(i) The applicant's organizational structure, allocations or responsibilities and authorities, and personnel qualifications requirements.

(ii) Managerial and administrative controls to be used to assure safe operation. Appendix B, "Quality Assurance Criteria for Nuclear Power Plants and Fuel Reprocessing Plants," sets forth the requirements for such controls for nuclear power plants and fuel reprocessing plants. The information on the controls to be used for a nuclear power plant or a fuel reprocessing plant shall include a discussion of how the applicable requirements of Appendix B will be satisfied.

* * *

§ 50.55 Conditions of construction permits.

Each construction permit shall be subject to the following terms and conditions:

* * *

(c) Except as modified by this section and § 50.55a, the construction permit shall be subject to the same conditions to which a license is subject.

* * *

(e)(1) If the permit is for construction of a nuclear power plant, the holder of the permit shall notify the Commission of each deficiency found in design and construction, which, were it to have remained uncorrected, could have affected adversely the safety of operations of the nuclear power plant at any time throughout the expected lifetime of the plant, and which represents:

(i) A significant breakdown in any portion of the quality assurance program conducted in accordance with the requirements of Appendix B to this part; or

* * *

(f)(1) Each nuclear power plant or fuel reprocessing plant construction permit holder subject to the quality assurance criteria in Appendix B of this part shall implement, pursuant to § 50.34(a)(7) of this part, the quality assurance program described or referenced in the Safety Analysis Report, including changes to that report.

* * *

§ 50.56 Conversion of construction permit to license; or amendment of license.

Upon completion of the construction or alteration of a facility, in compliance with the terms and conditions of the construction permit and subject to any necessary testing of the facility for health or safety purposes, the Commission will, in the absence of good cause shown to the contrary issue a license of the class for which the construction permit was issued or an appropriate amendment of the license, as the case may be.

* * *

Appendix B—Quality Assurance Criteria For Nuclear Power Plants and Fuel Reprocessing Plants

Introduction. Every applicant for a construction permit is required by the provisions of § 50.34 to include in its preliminary safety analysis report a description of the quality assurance program to be applied to the design, fabrication, construction, and testing of the structures, systems, and components of the facility. Every applicant for an operating license is required to include, in its final safety analysis report, information pertaining to the managerial and administrative controls to be used to assure safe operation. Nuclear power plants and fuel reprocessing plants include structures, systems, and components that prevent or mitigate the consequences of postulated accidents that could cause undue risk to the health and safety of the public. This appendix establishes quality assurance requirements for the design, construction, and operation of those structures, systems, and components. The pertinent requirements of this appendix apply to all activities affecting the safety-related functions of those structures, systems, and components; these activities include designing, purchasing, fabricating, handling, shipping, storing, cleaning, erecting, installing, inspecting, testing, operating, maintaining, repairing, refueling, and modifying.

As used in this appendix, "quality assurance" comprises all those planned and systematic actions necessary to provide adequate confidence that a structure, system, or component will perform satisfactorily in service. Quality assurance includes quality control, which comprises those quality assurance actions related to the physical characteristics of a material, structure, component, or system which provide a means to control the quality of the material, structure, component, or system to predetermined requirements.

I. Organization

The applicant[1] shall be responsible for the establishment and execution of the quality assurance program. The applicant may delegate to others, such as contractors, agents, or consultants, the work of establishing and executing the quality assurance program, or any part thereof, but shall retain responsibility therefor. The authority and duties of persons and organizations performing activities affecting the safety-related functions of structures, systems, and components shall be clearly established and delineated in writing. These activities include both the performing functions of attaining quality objectives and the quality assurance functions. The quality assurance functions are those of (a) assuring that an appropriate quality assurance program is established and effectively executed and (b) verifying, such as by checking, auditing, and inspection, that activities affecting the safety-related functions have been correctly performed. The persons and organizations performing quality assurance functions shall have sufficient authority and organizational freedom to identify quality problems; to initiate, recommend, or provide solutions; and to verify implementation of solutions. Such persons and organizations performing quality assurance functions shall report to a management level such that this required authority and organizational freedom, including sufficient independence from cost and schedule when opposed to safety considerations, are provided. Because of the many variables involved, such as the number of personnel, the type of activity being performed, and the location or locations where activities are performed, the organizational structure for executing the quality assurance program may take various forms provided that the persons and organizations assigned the quality assurance functions have this

[1] While the term "applicant" is used in these criteria, the requirements are, of course, applicable after such a person has received a license to construct and operate a nuclear powerplant or a fuel reprocessing plant. These criteria will also be used for guidance in evaluating the adequacy of quality assurance programs in use by holders of construction permits and operating licenses.

required authority and organizational freedom. Irrespective of the organizational structure, the individual(s) assigned the responsibility for assuring effective execution of any portion of the quality assurance program at any location where activities subject to this appendix are being performed shall have direct access to such levels of management as may be necessary to perform this function.

II. Quality Assurance Program

The applicant shall establish at the earliest practicable time, consistent with the schedule for accomplishing the activities, a quality assurance program which complies with the requirements of this appendix. This program shall be documented by written policies, procedures, or instructions and shall be carried out throughout plant life in accordance with those policies, procedures, or instructions. The applicant shall identify the structures, systems, and components to be covered by the quality assurance program and the major organizations participating in the program, together with the designated functions of these organizations. The quality assurance program shall provide control over activities affecting the quality of the identified structures, systems, and components, to an extent, consistent with their importance to safety. Activities affecting quality shall be accomplished under suitably controlled conditions. Controlled conditions include the use of appropriate equipment; suitable environmental conditions for accomplishing the activity, such as adequate cleanness; and assurance that all prerequisites for the given activity have been satisfied. The program shall take into account the need for special controls, processes, test equipment, tools, and skills to attain the required quality, and the need for verification of quality by inspection and test. The program shall provide for indoctrination and training of personnel performing activities affecting quality as necessary to assure that suitable proficiency

is achieved and maintained. The applicant shall regularly review the status and adequacy of the quality assurance program. Management of other organizations participating in the quality assurance program shall regularly review the status and adequacy of that part of the quality assurance program which they are executing.

* * *

Commission Policy Statement on Fitness for Duty of Nuclear Power Plant Personnel

51 Fed. Reg. 27, 921 (Aug, 4, 1986)

AGENCY: Nuclear Regulatory Commission.

ACTION: Policy statement.

* * *

Introduction

The Nuclear Regulatory Commission (NRC) recognizes drug and alcohol abuse problems to be a social, medical, and safety problem affecting every segment of our society. Given the pervasiveness of the problem it must be recognized that it exists to some extent in the nuclear industry. Prudence, therefore, requires that the Commission consider additional appropriate measures to provide reasonable assurance that a person who is under the influence of alcohol or any substance legal or illegal which affects that person's ability to perform duties safely, is not allowed access to a vital area at a nuclear power plant.

The nuclear power industry, with assistance from programs developed and coordinated by EEI and the Institute of Nuclear Power Operations (INPO), has made and is continuing to make substantial progress in this area.

* * *

Policy Statement

The Commission recognizes that the industry, through the initiatives of the Nuclear Utility Management and Resources Committee (NUMARC), EEI, and INPO, has made progress in developing and implementing nuclear utility employee fitness for duty programs. The Commission stresses the importance of industry's initiative and wishes to further encourage such self-improvement.

Subject to the continued success of industry's initiatives in implementing fitness for duty programs and NRC's ability to monitor the effectiveness of those programs, the Commission will refrain from new rulemaking on fitness for duty of nuclear power plant personnel for a minimum of 18 months from the effective date of this Policy Statement. The Commission's decision to defer implementation of rulemaking in this area is in recognition of industry efforts to date and the intent of the industry to utilize the EEI Guidelines in developing fitness for duty programs. The Commission will exercise this deference as long as the industry programs produce the desired results. However, the Commission continues to be responsible for evaluating licensee's efforts in the fitness for duty area to verify effectiveness of the industry programs. The Commission will reassess the possible need for further NRC action based on the success of those programs during the 18-month period.

At the Commission's request, the industry agreed to undertake a review of the program elements and acceptance criteria for a fitness for duty program. EEI modified and issued the revised "EEI Guideline to Effective Drug and Alcohol/Fitness for Duty Policy Development." Further, INPO enhanced its performance objectives and criteria for its periodic evaluations to include appropriate criteria for fitness for duty. Copies of the documents describing the program elements and criteria for fitness for duty programs developed by the industry are provided to NRC for review and comment.

The NRC will evaluate the effectiveness of utility fitness for duty programs by its normal review of industry activities, through reviews of INPO program status and evaluation reports, periodic NRC observation of the conduct of INPO evaluations, and direct inspections conducted by the NRC's Performance Appraisal Teams, Regional Office, and Resident Inspectors. NRC will also monitor the progress of individual licensee programs.

By way of further guidance to licensees, Commission expectations of licensee programs for fitness for duty of nuclear power plant personnel may be summarized as follows:

- It is Commission policy that the sale, use, or possession of alcoholic beverages or illegal drugs within protected areas at nuclear plant sites is unacceptable.
- It is Commission policy that persons within protected areas at nuclear power plant sites shall not be under the influence of any substance, legal or illegal, which adversely affects their ability to perform their duties in any way related to safety.
- An acceptable fitness for duty program should at a minimum include the following essential elements:

(1) A provision that the sale, use, or possession of illegal drugs within the protected area will result in immediate revocation of access to vital areas and discharge from nuclear power plant activities. The use of alcohol or abuse of legal drugs within the protected area will result in immediate revocation of access to vital areas and possible discharge from nuclear power plant activities.

(2) A provision that any other sale, possession, or use of illegal drugs will result in immediate revocation of access to vital areas, mandatory rehabilitation prior to reinstatement of access, and possible discharge from nuclear power plant activities.

(3) Effective monitoring and testing procedures to provide reasonable assurance that nuclear power plant personnel with access to vital areas are fit for duty.

The industry, by periodic briefings or other appropriate methods, is expected to keep the Commission informed on program status. The NRC may also from time to time ask individual licensees to provide such information as the Commission may need to assess program adequacy.

* * *

Pursuant to Rule 28.1, Petitioner makes the following statement disclosing parents, subsidiaries (except wholly owned subsidiaries), and affiliates of Bechtel Construction, Inc. as of January 15, 1988:

American Bechtel, Inc.
Arabian Bechtel Company Limited
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